Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE
COURT OF APPEALS OF INDIANA

JESSE L. WHITFIELD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 03A01-0702-CR-99
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Chris D. Monroe, Judge
Cause No. 03D01-0209-FA-1344
03D01-0504-PC-699

AUGUST 2, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

GARRARD, Senior Judge

On September 11, 2002, Whitfield was charged with two counts of Class A felony child molesting and two counts of Class C felony child molesting. The state tendered a plea offer on November 12, 2002 that was rejected. On October 9, 2003, a new plea offer was tendered, accepted by Whitfield and he pled guilty to one count of Class B felony child molesting, a lesser included offense. He was subsequently sentenced to eighteen years imprisonment.

On July 6, 2005, Whitfield filed, in effect, a petition for permission to file a belated appeal. The trial court denied the petition, but on appeal this court reversed. A petition for transfer was denied on January 3, 2007. Whitfield's new petition for permission to file a belated appeal was filed January 9th , and was granted by the trial court on February 9, 2007. The case was duly briefed and this appeal ensued.

The principal error presented urges that Whitfield is entitled to the application of *Blakely v. Washington,* 542 U.S. 296 (2004) and *Smylie v. State,* 823 N.E.2d 679 (Ind. 2005) and that his sentence violates the principles there announced.

Our supreme court recently decided this issue against Whitfield. In *Gutermuth v. State,* 868 N.E.2d 427 (Ind. 2007) the court held that the belated appeal of a sentence entered before *Blakely* was decided is not subject to the holding in that case. Accordingly, Whitfield may not predicate error in his sentence based upon the requirements laid down in *Blakely.*

He also contends that his sentence was not appropriate under Ind. Appellate Rule 7(B) in light of the nature of the offense and the character of the offender.

In a review under A.R. 7(B) we are to give due consideration to the trial court's decision, and the starting point is the presumptive sentence. *See*, *Childress v. State*, 848 N.E.2d 1073, 1081 (Ind. 2006).

In sentencing Whitfield the court found a number of aggravating factors. Based upon the LSIR evaluation, his prior history, lack of education and job skills, his difficulty in following the rules and interacting with authority figures, the lack of a family support system, his history of alcohol and drug abuse, his repeated statements in which he did not take responsibility for what occurred and the young age of the victim, the court determined that Whitfield had an extremely high risk of committing another offense, even one of the same type.

The court found aggravation in the nature and circumstances of the crime due to the tender age of the victim, evidence that it was not consensual and occurred not just once but twice or more on the same date and that threats were made to the victim.

Whitfield's prior record of a number of offenses, while relatively minor, showed a pattern of inability or lack of desire to follow the law.

His unwillingness or inability to follow the law even when in jail and his poor behavior in jail indicated to the court the likelihood of failure if he were placed on probation.

The court also determined that he was in need of correctional rehabilitative treatment in the form of the Sex Offender Maintenance and Management program.

The court also found two mitigating circumstances but believed they were entitled to relatively minor weight: Whitfield's diminished capacity (his I.Q was 79) and the fact he pled guilty, albeit late in the process of proceeding to trial.

Information before the court supported its findings.

The presumptive sentence for a Class B felony was ten years to which up to ten years might be added for aggravating circumstances. The court sentenced Whitfield to eighteen years.

We are unable to say that considering the nature of the offense and the character of the offender the sentence imposed was inappropriate.

Affirmed.

NAJAM, J., and MAY, J., concur.